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## THE EFFECTS OF THE AUTONOMY OF THE PARTIES ON THE VALIDITY OF CONFLICT-OF-LAWS SALES CONTRACTS\*

By LOUIS C. JAMES\*\*

**S**ALES contracts quite often touch several states. For instance<sup>1</sup> A in Washington, D. C., orders goods on credit from R in Pittsburgh, Pennsylvania. R ships the goods by rail to fulfill the agreement. The carrier delivers to A in Washington, D. C. The parties, both being familiar with the laws of Pennsylvania, stipulate that the contract shall be governed as to its validity by Pennsylvania law. This hypothetical poses certain questions.

The case comes on for hearing in the courts of state M on a question of the contract's validity. What law will the courts of state M apply, and why, in order to determine the validity of the agreement? Are there any limiting factors on the courts of M applying the law chosen by the parties? What are they? What part should the public policy of M "play" in the decision? Are there any limitations on the courts of M applying its own policy or that of some place which it believes has a most vital contact with an essential element of the contract in negating parties' stipulated law? If the courts of M indicate that the presumed intent of the parties will be followed, is it not likely that the courts will the more readily lean to an expressly stipulated law of the parties if that law has a reasonable connection with an essential element of the contract? We have no interest with title matters.<sup>2</sup> Constitutional limitations will be discussed in a later article.

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\* This article is one of a series. See James, *Effects of the Autonomy of the Parties on Conflict of Laws Contracts*, 36 CHI.-KENT. L. REV. 34 (1959); James, *The Effects of the Autonomy of the Parties on the Validity of Conflict of Laws "Illegal Contracts"—Sunday, Gambling, Lottery and Other Agreements*, 8 AM. U.L. REV. 67 (1959); James, *Effects of the Autonomy of the Parties on Conflict of Laws Contracts*, 36 CHI.-KENT. L. REV. 87 (1959); and James, *The Effects of the Autonomy of the Parties on the Validity of Conflict of Laws of Surety and Guaranty Contracts*, 9 AM. U.L. REV. 24 (1960).

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<sup>1</sup> VOLD, *SALES*, 76-82 (2d ed., 1959).

<sup>2</sup> It has been said that: "... the distinction between a contract relating to a thing and a conveyance of a thing presents itself as a matter of characterization of the subject or question—a matter which must be decided by a court as a necessary preliminary to the court's selection of the proper law, that is, the law to be applied by the court in deciding the main subject or question. Preliminary to the characterization of the subject or question which is before the court is the characterization of the thing itself, if the subject or question is

Usually, the intention of the parties, expressed<sup>3</sup> or presumed,<sup>4</sup> is the ultimate criterion of the governing law for conflict-of-laws sales of personal property contracts. The law chosen by the parties to govern their contract must not (in the eyes of the forum) conflict with the public policy of the forum,<sup>5</sup> or with the public policy of a place having a most vital or natural connection with an essential

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one of property or related to a thing." Falconbridge, *Contract and Conveyance in the Conflict of Laws, Part I*, 81 U. PA. L. REV. 661 (1933). See also, FOOTE, *PRIVATE INTERNATIONAL LAW*, 284-86, 446 ff. (5th ed. 1925) on contrast between contract and conveyance. See also, WESTLAKE, *PRIVATE INTERNATIONAL LAW* §§ 156, 172, 216 (5th ed. 1932) and DICEY, *CONFLICT OF LAWS*, rules 150-54, 163, 164 (5th ed. 1932). See also, WHITNEY, *SALES*, §§ 1, 8 (3d ed. 1941); RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY*, III, 76-100 (1950); VOLD, *SALES* 2, 6, 303 (1931); Annot., 64 L.R.A. 823 (1915).

<sup>3</sup> See Note, *Commercial Security and Uniformity Through Express Stipulations in Contracts as to Governing Law*, 62 HARV. L. REV. 647 (1949); Lorenzen's series of articles on contracts in 30 YALE L.J. 565, 655 (1921), and 31 YALE L.J. 53 (1922); RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY*, III (1950); RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY*, I (1945); Parker, *Free Will in Conflict of Laws—Legal Transactions Super-seding Territorial Law and Receiving Foreign Law*, 6 TUL. L. REV. 454 (1932); Nussbaum, *Conflict Theories of Contracts: Cases Versus Restatement*, 51 YALE L.J. 893 (1942); Note, *Conflict of Laws—Choice of Law in Contracts—Intent of the Parties—Renvoi*, 40 COLUM. L. REV. 518-21 (1940); Rheinstein, Book Review, 37 COLUM. L. REV. 327 (1937); BATIFFOL, *LES CONFLICTS DE LOIS EN MATIERE DE CONTRATS* (1938); WOLFF, *PRIVATE INTERNATIONAL LAW* (1945); NUSSBAUM, *PRIVATE INTERNATIONAL LAW* (1943).

<sup>4</sup> See Note, *Conflict of Laws in Contracts of Sale*, 16 GEO. L.J. 387 (1928); NUSSBAUM *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* (1943); Falconbridge, *Contract and Conveyance in the Conflict of Laws, Part I*, 81 U. PA. L. REV. 661 (1933); *Part II*, 81 U. PA. L. REV. 817 (1933); RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY*, I (1945), III (1950); BATIFFOL, *LES CONFLICTS DE LOIS EN MATIERE DE CONTRATS* (1938); Lorenzen, *The Validity of Wills, Deeds and Contracts as Regards Form in the Conflict of Laws*, 20 YALE L.J. 427 (1911); Lorenzen, *Validity and Effect of Contracts in The Conflict of Laws*, 30 YALE L.J. 565 (1920); SAVIGNY, *PRIVATE INTERNATIONAL LAW* (Guthrie's trans. 1880); Lorenzen, *The Statute of Frauds and the Conflict of Laws*, 32 YALE L.J. 311 (1932); 1 WILLISTON, *SALES* (rev. ed. 1948); WOLFF, *PRIVATE INTERNATIONAL LAW* (1945); Annot., 64 L.R.A. 823 (1915); Annot., 61 L.R.A. 417 (1913); 17 C.J.S. *Contracts* § 12 (1939); 55 C.J.S. *Sales* § 6 (1952); Annot., 87 A.L.R. 1308-15 (1933) Annot., 25 A.L.R. 1153 (1923); Annot., 57 A.L.R. 535 (1928); 2 BEALE, *CONFLICT OF LAWS* (1935); Annot., 112 A.L.R. 124 (1938).

<sup>5</sup> See Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 COLUM. L. REV. 1027 (1940); Note, *Conflict of Laws—Public Policy—Effect of Public Policy of the Forum on Foreign Contracts*, 79 U. PA. L. REV. 635 (1931); RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY*, II (1947); NUSSBAUM, *PRIVATE INTERNATIONAL LAW* (1943); Nussbaum, *Conflict Theories of Contracts: Cases Versus Restatement*, 51 YALE L.J. 893 (1942); STUMBERG, *CONFLICT OF LAWS* 278-79 (2d ed. 1951); Note, *Conflicts of Laws—Contracts—Enforcement of Foreign Contract Though Contrary to State Policy*, 53 MICH. L. REV. 1178 (1955); GOODRICH, *CONFLICT OF LAWS* § 6 (3d ed. 1949).

element of the transaction<sup>6</sup> as viewed by the forum. It must be borne in mind that the use of public policy as a limiting factor on parties freedom of contract has, in turn, its own constitutional limitations.<sup>7</sup>

Some courts indicate that the sales agreement is governed by the law of the place of making;<sup>8</sup> other courts state that the law of the place of performance governs the sales agreement.<sup>9</sup> Some courts view the intention of the parties as the governing law of the contract.<sup>10</sup> Are not the mechanisms of "place of making," "place of per-

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<sup>6</sup> See, *The Kensington*, 183 U.S. 263 (1902); *Duskin v. Pennsylvania-Central Airlines Corp.*, 167 F.2d 727 (6th Cir. 1948); *Northern Pacific R.R. v. Kempton*, 138 Fed. 992 (9th Cir. 1905); *Ingleheart Bros. v. John Deere Plow Co.*, 114 Ind. App. 182, 51 N.E.2d 498 (1943); *Rubin v. Gallagher*, 294 Mich. 123, 292 N.W. 584 (1940); *Owens v. Hagenbeck-Wallace Shows Co.*, 58 R.I. 162, 192 Atl. 158 (1937); *Stevenson v. Lima Locomotive Works, Inc.*, 180 Tenn. 136, 172 S.W.2d 812 (1943);

See also, Note, *Intention of the Parties—The Requirement of Substantial Connection*, 10 LA. L. REV. 346 (1950).

<sup>7</sup> See Note, *Conflict of Laws—Contract—Enforcement of Foreign Contract Though Contrary to State Policy*, 52 MICH. L. REV. 1178 (1955). The author of this note states: "The general rule of conflict of laws is that a contract valid at the place of making or the place of performance will be enforceable by the courts of the forum had it been made or was performable, within the state. . . ." citing GOODRICH, *CONFLICT OF LAWS* §§ 106-07, 109-10 (3d ed. 1949) and STUMBERG *CONFLICT OF LAWS* 226-41 (2d ed. 1951). The author of the note cites GOODRICH, *op cit. supra.*, §§ 11 and 106 and STUMBERG, *op cit. supra.*, 168-71, 278-79, for authority for his statement; ". . . that no right will be enforced which would contravene the public policy of the state of the forum" as an exception to the above rule. But he then states a qualification to the exception that, ". . . constitutional objections may arise should the forum capriciously apply its own substantive law rather than the law of the situs of the transaction," citing thereto the following authorities; "Denial of due process and full faith and credit have been argued in conflict of law cases. See *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930); *Bradford Electric Light Co. v. Clapper*, 286 U. S. 145 (1932); *Hartford Accident & Indemnity Co. v. Dettor Pine Land Co.*, 292 U. S. 143 (1934); *John Hancock Mutual Ins. Co. v. Yates*, 299 U. S. 178 (1936); *Order of the United Commercial Travelers of America v. Wolfe*, 331 U. S. 586 (1947)."

Also see, Nutting, *Suggested Limitations of the Public Policy Doctrine*, 19 MINN. L. REV. 196 (1935).

<sup>8</sup> See, RABEL, *CONFLICT OF LAWS: A COMPARATIVE STUDY*, III at 52 (1950). Professor Rabel observes that: "In appearance, the court always chooses the law of the place of contracting, or that of the place of performance following some fixed or causal axiom". He concluded that "the place of contracting has lost favor and adds that "it should be noted that English and American courts have given consideration to mercantile habits, and, as a matter of course [in some appropriate cases] have applied the law of the place at which the seller is bound to make shipment." *Id.*, at 54. He finds that at the time of his writing (1950) the law is a mixture of many ideas as to the choice of law.

Professor Vold speaks of place of contracting, place of performance and the intent theory as alternative tests. See, VOLD, *SALES* 78-82 (2d ed. 1959).

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

formance," *et cetera*, in many instances but spatial contracts of the contract used by some courts as means to ascertain the intention of the parties, or by the parties themselves, at times, to fix the law of a definite place to govern the agreement? Should not these mechanisms be used by all courts to ascertain the law the parties intend should apply (when the parties have not expressly stipulated for the law of a reasonably connected place to govern their transactions)? After all, whose agreement is in issue—the state's (and what state, when several states may be connected with the agreement?) or the parties?

Professor Rheinstein, in a book review,<sup>11</sup> observes that Monsieur Jeanpetre's inquiry into American conflict of law contract cases seems to indicate that:

"Although, superficially, the courts [in American] seem to be divided between three apparently inconsistent doctrines, *viz.*, intention of the parties, law of the place of contracting, and the law of the place of performance, an analysis of the cases proves to M. Jeanpetre's satisfaction that the latter two rules are merely supplementary to the first one. The overwhelming majority of the cases are said to accept the theory that the parties are free to choose the law by which the validity of their contract should be determined although the range of choice allowed the parties is rather limited."<sup>12</sup>

Professor Arthur Nussbaum states that:<sup>13</sup>

"There are in private international law few ideas as time-honored and universally adopted by courts as the proposition that the law governing a contract must principally be ascertained from the express or implied common intention of the parties."<sup>14</sup>

Elaborating on this point, Professor Nussbaum continues:

"Where the law governing the contract is not expressly agreed upon by the parties, courts have been eager to infer from the surrounding circumstances an 'implied' or 'hypothetical' intent of the parties. The generally followed view is that the governing law should be of that country with which, in expressed or presumed intent of the parties, the contract has its most important connection, taking into account the various territorial 'contacts' [referred to as spatial contacts in this article] of the agreement, such as the place of contracting, place of performance, domicile of the parties, etc."<sup>15</sup>

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<sup>11</sup> Rheinstein, Book Review, 37 COLUM. L. REV. 327 (1937).

<sup>12</sup> *Ibid.*

<sup>13</sup> NUSSBAUM, PRIVATE INTERNATIONAL LAW 157-59 (1943).

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

Another authority, Professor Martin Wolff, echoes the same theme stating that:<sup>16</sup>

"[T]he rule stating that the parties have the power to determine the 'proper' law of their contract or, to put it differently, that the *lex voluntatis* governs the contract, is a legal rule forming part of the private international law of most countries."<sup>17</sup>

Professor Wolff then seems to arrive at a conclusion that when the parties have not stipulated for a law to govern their agreement, the courts may look at all the surrounding circumstances of the agreement in order to determine what they had in view presumably as the law to govern their agreement.<sup>18</sup> Few, if any, would deny that "the place of contracting," "the place of performance," *et cetera*, are quite important "surrounding circumstances."<sup>19</sup> We shall now turn to several cases.

In *Chinchilla v. Foreign Tankship Corp.*<sup>20</sup> (an employment

<sup>16</sup> WOLFF, *PRIVATE INTERNATIONAL LAW* 421-22 (1945).

<sup>17</sup> *Ibid.*

<sup>18</sup> *Id.*, at 436-37.

<sup>19</sup> *Ibid.* See also Parker, *Free Will in Conflict of Laws—Legal Transactions Superseding Territorial Law and Receiving Foreign Law*, 6 TUL. L. REV. 454 at 455-56 (1932), where the author found that both the place of the making and the place of performance have no particular efficacy "other than as incidents in determining what law the parties intend shall govern their transaction." The author of this article further states that: "Some courts have required that the law intended should have a substantial connection with the transaction."

See also, Robinson, *Conflict of Laws in Contracts of Sale*, 16 GEO. L.J. 387 (1928).

<sup>20</sup> *Chinchilla v. Foreign Tankship Corp.*, 195 Misc. 895, 91 N.Y.S.2d 213 (1949). In this case, although the parties in the agreement of employment signed certain "Conditions of Employment" which included a stipulation that the Panama law should apply, the court determined the law of Panama applied under the "Conditions" agreement to a claim for injury or illness only. The court found that the claim in litigation related to contract and its breach in an employment relation and not to illness and injury so the stipulated law of the parties did not apply to the question posed. The court arrived at the intent of the parties in applying New York (forum) law. Said the court:

"Here if we assume that the *locus contractus* is on the high seas and therefore, by fiction in the [T]erritory of Panama, I think, that reference to our law nevertheless is indicated. The articles and the 'Conditions of Employment' are in English, they follow our modes of expression and terminology, they express payment in American dollars. The address of the owner is recited to be in California and all communications relating to the plaintiff's services emanated from the California office or from the New York office. There is nothing to suggest that any act of the parties had its 'locus' in Panama, except the flag of the vessel."

Parties presumed intent law applied when expressly stipulated law applied only to illness or injury and there was no expressly stipulated law by the parties as to breach of the contract. 91 N.Y.S.2d at 218.

It should be borne in mind that personal rights and duties flowing from sales agreements are governed by principles of law ordinarily applied to other

contract case), the court indicated that although the parties to an agreement do not have a complete autonomy in their choice of law to govern their contract, circumstances indicate that for some purposes they may reasonably refer to the law of a sovereign other than the one which would normally govern their transaction, and such reference would ordinarily be respected.

It seems reasonable to assume that what the court meant by its statement that the parties to a contract do not have complete choice of law autonomy was that a reasonably connected law chosen by the parties to govern their contract would usually be respected. Since it may be assumed that normally parties to a contract are rational beings and that rational beings do not irrationally select the law of a place to govern their contract we can find no complaint with this concept of the court. We might ask the court to be more specific when it infers that parties may for some purposes choose a law to govern the contract other than that which would normally govern their transaction. What purposes would the court list? What law should normally govern conflict-of-laws contracts? Should not that law be parties choice of law which has a reasonable connection with an essential or natural element of the agreement?

The court, in *Igleheart Bros. Inc. v. John Deere Plow Co.*<sup>21</sup> (a conditional sales "presumed intent" case), found that the contracts were apparently Illinois agreements since it appeared from the transactions that the parties intended that that law should govern their contract. The agreements were executed in Illinois and

"... they expressly provide [said the court] that if default is made in the payment of any money due under them, the seller may take possession of the property and resell it in accordance with the laws of that state [Illinois], and it appears to us that it was the intention of the parties that the contracts should be governed by the laws of that state [Illinois]. The place intended bearing as it does a reasonable relationship to the transaction, and it not appearing that the parties were actuated by fraud, this intention of the parties will be given effect."<sup>22</sup>

But the court found that since the Illinois law was not established,

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contracts. See VOLD, SALES 41 (2d ed. 1959). Even conditional sales agreements are in relation to personal contractual rights and duties similar to other contracts. *Id.*, at 281-85.

<sup>21</sup> 114 Ind. App. 182, 51 N.E.2d 498 (1943).

<sup>22</sup> *Id.*, at 184, 51 N.E.2d at 499.

it was presumed to be the same as that of Indiana, which law (the forum's) was used.<sup>23</sup>

First, it should be observed that the court was primarily interested in carrying out the intention of the parties as the court presumed from the facts of the case.<sup>24</sup> Second, the court tied its decision to the law of a place having a most reasonable and vital connection with an essential element of the transaction, and only used the law of the forum when the law deemed by the court as intended by the parties to govern their agreement was not established. Third, the court apparently used the word "fraud" in a sense of that which might be considered as inherently bad or repugnant to the sense of the forum community. It is not felt that the use of the word "fraud" can be taken to mean "avoiding" a law of some other state having a vital<sup>25</sup> or natural connection with an essential element of the contract because the court must have known that whenever parties choose the law of another state to govern their transaction or when the court itself presumes an intent law, there is an "avoidance" of some law of some jurisdiction with possibly as strong a contention to the most vital connection with an essential element of the transaction as that chosen.<sup>26</sup> Fraud, therefore, must have an unsavory and sinister connotation when so used by the court. Unless this meaning is adopted it seems most difficult to see how a reasonable decision may be reached.

The court, in *Hamilton v. Joseph Schlitz Brewing Co.*<sup>27</sup> (a "presumed intent" case involving sales of intoxicating liquors), observed that the brewing company was a Milwaukee, Wisconsin, company. The plaintiff, suing for return of what he alleged was illegal payment of moneys for liquors in Iowa contrary to Iowa law, claimed that the contract of sale, made in Wisconsin as an original agreement, was modified by subsequent dealings with the agent of defendant in Iowa and later affirmed by defendant company by the shipment of the intoxicants to Iowa with bill of lading attached to be payable at a bank in Iowa prior to release of the goods. The bill of lading

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<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> Unless, in the forum's view, that other state had the most vital or natural connection with an essential element of the contract.

<sup>26</sup> Since human minds react differently, as a general rule, to what would be "the most vital or natural connection with an essential element of the contract," it would seem that there might be as many opinions on given set of facts as there are judges making the decision.

<sup>27</sup> 129 Iowa 172, 105 N.W. 438 (1905).



was in the name of defendant's agent in Iowa. The bill was indorsed in blank by the agent of the company in Iowa and sent to the Iowa bank in conjunction with other ramifications of the case of no importance to us. Said the court:

"Now as between vendor and vendee—and we have no other relationship to consider here—a contract of sale takes place when and where as may be agreed upon between the parties. And in every case the question is one of intention. That such is the general rule all the books are agreed. [citing cases.]"<sup>28</sup>

True, the case was reversed from a lower court's ruling that defendant recover, but it was on other grounds not pertinent to our discussion.

Another case of interest is that of *Hart v. Livermore Foundry & Mach. Co.*<sup>29</sup> (a "presumed intent" case in sales in which the law to govern the contract was first determined in order to adjust rights of creditors of both seller and buyer). There was a written contract between the seller, a resident and domiciliary of Mississippi, of timber and timber products located in Mississippi, and a buyer firm, whose main office was in Illinois, but whose officers negotiated the contract through an agent in Tennessee. The contract was made in Tennessee, but it was to be performed by delivery of the timber products in Mississippi. The court observed that:

"If this was [sic] a Tennessee contract, and therefore to be governed by the laws of that state, it would follow that no right whatever was secured by the delinquent corporation [the buyer]. . . . But we think the contract, though entered into in the [S]tate of Tennessee, and evidenced by writing, there subscribed by the parties, was in legal contemplation a contract governed by the laws of this state [Mississippi], both as to its obligations and execution. The lumber was to be cut by Hart [seller] in this state, was to be inspected and paid for, delivered and received here. Ordinarily, the validity of a contract is determinable by the '*lex loci contractus*,' but where, by the contract, a different place of performance is fixed, the presumption is that the parties, as they lawfully may do, contract with reference to the law of such place. [citing cases]"<sup>30</sup>

This case indicates that in the mind of the court the parties' intent should, as a general rule, be compiled with if there is some rea-

<sup>28</sup> *Id.*, at 128, 105 N.W. at 441.

<sup>29</sup> 72 Miss. 809, 17 So. 769 (1895).

<sup>30</sup> *Id.*, at 828, 17 So. at 773.

sonable connection between the law chosen by the parties to govern their contract and as essential element of the agreement. It does more than this. It seems to indicate also that the court viewed the parties' fixation of a definite place of performance as, by indirection, an indication of the parties intent as to what law was to govern their agreement. It appears to indicate further that the court thought that the place of performance was a spatial contact of great significance in all of the surrounding circumstances of the transaction (when the parties have not expressly stipulated for a law to govern their contract) by means of which to evaluate their true intent. Thus, the court, by indirection, seems to be saying (as previously brought out in this paper) that the mechanism of "place of performance," *et cetera*, is but a supplement to the general rule that the intent of the parties will usually govern the parties' contractual relations.

In *McAllister v. Smith*<sup>31</sup> (a usury case involving bills of exchange in which the bills were drawn by McAllister & Company, payable to the order of drawers, accepted by the defendant, and indorsed by drawers to plaintiffs, all the bills being drawn in Illinois, and all except one in the first count of the action were made payable in the city of New York), the court observed in determining what law should govern the contract that:

"For the *lex loci contractus* and the *lex loci contractus rei sitae*, when respectively applicable, enter into and form part of every civil contract, respecting rights of property in things, and choses in action, and so of *lex domicile* respecting mere personal contracts, such as marriage, etc. This is, the general rule, and apparently of great simplicity in the abstract . . .

The rule, when properly understood, has its apparent substitutions as well as exceptions. The case before us, as made by the pleas, is an instance of the former. The contracts were made in this state, and the laws of the state would, had the parties been silent, have become part of the contracts for the construction and meaning of the parties, in ascertaining and fixing their mutual rights and obligations. But parties may substitute the laws of another place and country than that where the contract is entered into, both in relation to the legality and extent of the original obligation and in relation to the respective rights of the parties for a breach or violation of its terms. This I call a substitution of the laws of another place or government for those of the place of entering into the contract, and which is noted by the authorities as an exception of the general rule. This is allowed in all civilized coun-

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<sup>31</sup> 17 Ill. 328 (1856).

tries, and, recognized as part of the *jus gentium*, or law of nations, respecting private and personal rights, and in all cases where the subject-matter of the contract is not *malum in se*, immoral, or contrary to the local policy, or dangerous to the peace and good order of the particular community in which it is sought to be enforced.”<sup>32</sup>

Let us analyze what the judge has said here. First, the *lex loci contractus* “when respectively applicable, . . . enter[s] into and forms part of every civil contract. . . .” At first glance, one would suspect the judge of being an advocate of the doctrine of vested rights in such cases.<sup>33</sup> But is this true? He qualifies his statement by the phrase “when applicable.” We may ask the question, when are such mechanisms as “place of performance” and the like applicable? Certainly, they may be applicable when the parties’ expressed intent is not indicated and a search is made for an unexpressed intent. And they may be as good as any other mechanism under such circumstances. For the forum is placed in a position of deciding a case and it must seek a reasonable choice of law to apply to the contract in making its decision. But are such mechanisms applicable when the parties have chosen a reasonably connected law to govern the contract? In effect, the judge seems to answer the question immediately above when he says:

“But the parties may substitute the laws of another place and country than that where the contract is entered into, both in relation to the legality and extent of the original obligation and in relation to the respective rights of the parties for a breach or violation of its terms.”<sup>34</sup>

In essence, is not the judge’s so-called “substitution” approach no less than an application of the intent theory—the general rule—employing the spatial contact mechanisms as “supplements” to the general rule when the parties’ intent cannot be ascertained by what they said and did? Are not the place of performance and the like but spatial contacts used as presumptions by the courts to ascertain parties’ intent left ambiguous by their agreement? If this is not true, why did the judge state in his next thought that “this [his ‘substitution’ or intent theory] is allowed in all civilized countries, and recognized as part of the *jus gentium*, or law of nations, respecting private and personal rights, . . .”<sup>35</sup> There is such a thing

<sup>32</sup> *Id.*, at 333.

<sup>33</sup> For the doctrine of vested rights, see Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 Harv. L. Rev. 361 (1945).

<sup>34</sup> 17 Ill. 328 (1856).

<sup>35</sup> *Ibid.*

as "substituting" away the "substitution" and making the intended "substitution" thereby the usual rather than the "substituted."

Possibly, some parties (and even some lawyers) may not know of the adequacy of the autonomy theory in conflict of laws contract situations and, therefore, fail to make use of the intent theory. This may be a reason why some courts are forced to find the intent by use of such mechanisms as place of making. Over a long expanse of time, usage may become custom and thence be crystalized into a rule of law. "Blind" following by courts of any usage or custom over a period of time may eventuate into a precedent. It is not denied that some courts may, at times, use the spatial contact mechanisms as a precedent not knowing the real reason for doing so.

Possibly, some courts may believe in a narrowly construed vested-rights theory and follow it blindly. But if rights should be termed vested by virtue of a contract being made or to be performed in some place, for whom are the rights vested—the state *qua* state, or the parties to the agreement? Are not the vesting of rights of the immediate parties to the contract after all a vesting to carry out, as nearly as possible, the rights of the parties derived from their intent as to what law they desire to govern their contractual relations? What parties are more concerned in a contract than those who are parties to it, and who made it for their own purposes?

Probably, some types of highly obnoxious agreements or, to speak more directly, some types of contracts that might materially damage the moral fiber of the forum, or some place, as seen by the forum as having a most vital contact with an essential element of the transaction, should be negated on grounds of public policy. Otherwise than this, who has a better right to freedom of contract than the parties to the agreement?

Lastly, in an analysis of the *McAllister* case, the judge does state what type of contracts the forum's policy concepts should negate. He states that the intent theory (what he calls a substitution) may be used "in all cases where the subject-matter of the contract is not *malum in se*, immoral, or contrary to the local policy, or dangerous to the peace and good order of the particular community in which it is sought to be enforced. . . ."<sup>36</sup> Even here, the judge should have stated what he meant by "local policy." For a "local policy" drafted into law by the legislature, or the courts

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<sup>36</sup> *Ibid.*

(by their decisions) for purely local contracts in contra-distinction to conflict-of-laws contracts should not be misused to negate that for which the local policy was not intended. The policy determinants of a state used on conflict-of-laws agreements should be carefully weighed as to the harm they may actually do to commercial contracts in interstate or international relations *versus* the good that may be done to these same relations by not using a forum's own policy to negate the contract or the policy of some other place, as seen by the forum, having a vital connection with an essential element of the agreement. As I have said in other articles,<sup>37</sup> what is right or what is wrong, what is moral or what is immoral, is a concept at best ever changing to fit the mores of an ever changing place in time and space. In connection with the use of policy determinants by the forum, we have observed that the forum may in turn be limited in its use of public policy by constitutional limitations.<sup>38</sup> Let us now turn to the stipulated law.

In *Globe Slicing Mach. Co. v. Murphy*,<sup>39</sup> the defendant, Globe was a New York corporation with salesmen in Baltimore, Maryland. The contract of interest here related to the right of the company to settle any dispute that might arise between its salesmen over commissions. The contract was apparently made in New York, although the case does not state this. At least, New York was the seat of the defendant corporation—an important contact in the transaction. Also, New York law was stipulated by the parties to govern the contract. The suit was brought in Baltimore, Maryland, for certain commissions. Baltimore seems to have been the home or at least the business location of the plaintiff, Murphy, but here again, the court is not specific.

The court referred to the contract stipulation,

“ . . . that any question which might arise in any court of any state as to the validity, construction, interpretation, or performance of the contract, should be governed by the laws of the state of New York; and the trial court was asked to rule that, since no attempt had been made by the plaintiff in this case to show what were the laws of New York determining the

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<sup>37</sup> E.g. James, *Effects of the Autonomy of the Parties on Conflict of Laws Contracts*, 36 CHI.-KENT L. REV. 34, 49 (1959). This is not to deny that there may be an ultimate “right” and an ultimate “wrong.” Many of us believe there is. Rather it is to say that we have, at best, an imperfect ability to ascertain the “just” and “unjust,” and our attempts to do so are still but human attempts with all the human fallacies.

<sup>38</sup> See note 7, *supra*.

<sup>39</sup> 161 Md. 667, 158 Atl. 26 (1932).

rights and obligations involved in the controversy, these rights and obligations could not be determined, and the plaintiff could not recover. But whatever may be the force in other answers to the argument, it is sufficient to observe that the consequence does not follow from a failure to prove the laws of a foreign state, unless rights under statute laws should be in question, and we have no reason to suppose that any statute law of New York might govern questions such as arise in this case. The express adoption of the foreign law by the parties has the same effect as adoption by rule of law. "The laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms; and this rule embraces alike those which affect its validity, construction, discharge and enforcement." *Brown v. Smart*, 69 Md. 320, 330, 14 A[tl]. 468, 471 [1888]. . . . And it has been decided many times that in the absence of the requisite proof of the foreign law, the law of the forum will be looked to for guidance. [citing cases] We find no error in the rejection of the first prayer [that judgment be entered against the plaintiff for failure to prove the relevant New York law.]"<sup>40</sup>

This case not only upholds the expressly stipulated law of the parties as the controlling law of the contract, but it indicates other points of interest as well. The court states that "the express adoption of the foreign law by the parties has the same effect as adoption by rule of law."<sup>41</sup> What is the thrust of this statement? What is meant by "rule of law?" Does it mean that the court recognizes the autonomy theory as a general principle that all other courts under similar conditions should follow?

If the autonomy theory is a general principle, how can the view of the court in the *Globe* case be a "substitution" to a general rule, as a literal reading of the *McAllister* case, *supra*, would seem to indicate; or, is it a holding that reinforces the *McAllister* case, as I have interpreted it?

The court in the *Globe* case makes another provocative statement. "The laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms; . . ."<sup>42</sup> Could the court have been thinking of the spatial contact mechanisms (e.g. the place of making) as means employed by courts to find the intent of the

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<sup>40</sup> *Id.*, at 671, 158 Atl. at 27.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

parties as to the law they wish to control their contract when they have not expressly stipulated such matter?

Even if the court in this last statement was thinking of vested rights, what rights other than those arrived at by parties' intent law could the court have contemplated? For whom are contracts primarily made—the parties to them or for some sovereign state? Whose intent is better to control parties' contracts than their own intent? As we said of the *McAllister* case, *supra*, there may be types of contracts in which the forum may find some feature so obnoxious to it or so destructive of its own moral fiber, or of some state having a vital connection with an essential element of the contract (as viewed by the forum) that the forum will negate such contracts by the use of policy determinants. But, also, as we have said, policy determinants should be sparingly used by courts and on only such cases wherein the law of the state is definite in regard to conflict-of-laws.

The court, in *Compania De Inversiones Internacionales v. Industrial Mortgage Bank of Finland*,<sup>43</sup> observed that the plaintiff was a foreign corporation domiciled in South America. It brought action to recover a certain sum of money, with interest, by reason of its ownership and possession of three first mortgage collateral 7 per cent sinking fund gold bonds of the Industrial Mortgage Bank of Finland, a foreign corporation domiciled in Finland, and the defendant in this action. The bonds were bearer bonds and payment was promised in gold of the United States of America of the standard of weight and fineness as it existed on July 1, 1924. These bonds were issued in the state of New York by the defendant and first became valid obligations in the firm of Lee, Higginson & Company, a domestic copartnership, paying agents of the defendant bank pursuant to an agreement in trust made between the defendant bank and the New York Trust Company, in Manhattan (New York state). Both the principal and interest of these bearer bonds were payable at the office of the Lee Company in Manhattan, or at other named places in the United States of America. The defendant bank had exercised its option to redeem the bonds at 101 on an interest day—July 1, 1934. The bonds were guaranteed by Finland, but this action was not against the guarantor. In this case, the court said:

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<sup>43</sup> 269 N.Y. 22, 198 N.E. 617 (1935), citing *Wilson v. Lewiston Mill Co.*, 150 N.Y. 314, 44 N.E. 959 (1896); *Vander Horst v. Kittredge*, 229 App. Div. 126, 241 N.Y.S. 302 (1930); *cf.*, *Sokoloff v. Nat'l City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924).

"The contract was made in New York, and the bonds are payable and the entire performance of the contract is to take place in the United States. If no other intention is revealed, it must be taken that it was intended by the parties that United States law should be applicable to this contract. The intention of the parties, express or implied, generally determines the law that governs a contract. [citing cases] Moreover, in the absence of a revealed intention, if a contract is made and is to be performed in the same place, it is held that the law of that place governs. [citing cases]."<sup>44</sup>

In this case the court found that the United States public policy applied in reference to payment in gold since the passage of the joint resolution by Congress on payments in gold.<sup>45</sup> But the court also found that New York law was applicable to this contract. It seems most likely that the court thought of the place of making as a means to arrive at parties intent if and when it is not expressed. The court also found that American policy determinants on the gold clause were applicable since they were definite and apparently applied to all types of contracts involving such clauses in which the United States was a vital contact with an essential element of the agreement.

In *Vander Horst v. Kittredge*<sup>46</sup> (sale-of-realty contract with vital contract contacts with both South Carolina and New York), the court observed that:

"In the absence of a plain intention on the part of the parties to the contract that the contract was to be construed in accordance with the laws of another state than that in which made, we are of the opinion that the *lex loci contractus* governs."<sup>47</sup>

It is to be observed that in this case, the court sanctioned the use of the parties' stipulated law in the construction<sup>48</sup> of the contract

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<sup>44</sup> *Id.*, at 26, 198 N.E. at 618.

<sup>45</sup> Gold Repeal Joint Resolution, 48 Stat. 113 (1933), 31 U.S.C.A. § 463 (1954).

<sup>46</sup> 229 App. Div. 126, 241 N.Y.S. 302 (1930).

<sup>47</sup> 241 N.Y.S. at 309.

<sup>48</sup> It is of interest to observe that the court states: "We are of the opinion that the contract must be interpreted and construed by the law of the place where the contract was made. . ." in the absence of a plain intention of the parties. 241 N.Y.S. at 308. The use of the word "and" between the words "interpreted" and "construed" indicates that the construction here is used in a much broader sense than merely to interpret. See Beard, Interpretation and Construction of Government Construction Contracts (unpublished paper in American University, Washington College of Law Library). Examining in some detail the difference between construction and interpretation, Mr. Beard arrives at the conclusion that the courts are not always clear in the use of these two words. It would seem that in the *Vander Horst* case, the court may have



if there was a "plain intention on the part of the parties to the contract that the contract was to be construed in accordance with the laws of another state than that in which made . . ." <sup>49</sup> and only when this intent was not clear was the use of the *lex loci contractus* to be used as a means to determine their actual intention. The *Vander Horst* case, *supra* was a "construction" case. It seems reasonable to assume, from the court's own language above, that the court would have found no objection to a clearly specified intent-of-the-parties' law use even in ascertaining the agreement's validity, if that law specified had a most vital connection with an essential element of the transaction.

A problem may arise as to the choice of law to determine responsibility of the mortgagor for a deficiency upon a forced sale of the security for the debt. In *Stumpf v. Hallanan*, <sup>50</sup> a New York court faced this question and dealt with it as a contract matter to be governed by that law. The court observed that the law of New Jersey controlled because that was the intention of the parties as shown by the fact that the bond and mortgage formed a single contract, and that the land was located in the State of New Jersey as well as the bond being presumably payable there. New Jersey was also the residence of the mortgagee. The court observed that:

"First, all matters bearing upon the execution, interpretation, and validity of contracts, including the capacity of the parties to the contract, are determined by the laws of the place where the contract is made; second, all matters connected with its performance are regulated by the law of the place where the contract, by its terms, is to be performed; third, if no place of performance is mentioned in the contract, a presumption arises that the parties intended that it should be performed where it is made; fourth, contracts referring to the transfer of title to land are governed by the law of the place where the land is situated; fifth, all matters respecting the remedy to be pursued, including the bringing of suit, etc., depend upon the law of the place where the action is brought. These general rules are subordinate to the primary canon of construction, which requires that, where it can be ascertained, the intention of the parties shall govern. Thus, though it may be stated generally that a contract is to be considered and determined under the law of the state where it was made, this rule is of

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implied more than interpretation. Rather, the court might have implied the legal effect of the contract rather than the mere interpretation of the language used in the contract.

<sup>49</sup> 241 N.Y.S. at 309.

<sup>50</sup> 101 App. Div. 383, 91 N.Y.S. 1062 (1905), *aff'd*, 185 N.Y. 550, 77 N.E. 1196 (1906).

no force in a case where it can be fairly said that the parties at the time of its execution manifested an intention that it should be governed by the laws of another state, or, differently expressed, 'where the contract is either expressly or tacitly to be performed in another place than where made, there the general rule is in conformity to the presumed intention of the parties, that the contract as to its validity, nature, obligation, and interpretation is to be governed by the law of the place of performance.'<sup>51</sup>

It might be observed of the *Stumpf* case, *supra*, that the primary canon of contract interpretation before which all other general rules must be subordinated (in the view of the court) is that where the intention of the parties to the agreement can be ascertained it must govern. This would include not only the interpretation of the contract, but its validity and even the capacity of the parties themselves to make the agreement. Such a statement conforms with the essential tenets of the autonomy theory. Had the court been called upon to make an exception to this rule it would undoubtedly have said that a forum may use its public policy to refuse to enforce those contracts which it deems repugnant to its sense of morals, the public welfare and the sustenance of the forum itself. The court would also undoubtedly have said, if it had been called upon to speak further in this matter, that policy determinants may be used by the forum to negate parties' intent law when it is in conflict with the law of a place, seen by the forum, as having a most vital contact with an essential element of the contract. Further, the court might have frowned upon an unreasonable referral by the parties to some law not in any way—economically or otherwise—connected with the transaction; but it is most difficult to conceive of rational contracting parties referring their contract governance to an irrational place law to govern its validity.

In *Stevenson v. Lima Locomotive Works*<sup>52</sup> (a conditional-sales contract in which relative rights of a conditional vendor and vendee were treated as matters relating to contracts) the facts indicated that the sales agreement was signed in Tennessee by the complainant, a resident of Arkansas, for the purchase of a machine from the defendant, a Virginia corporation having its main office in Ohio, and a branch office in Tennessee. Notes secured by the agreement

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<sup>51</sup> 91 N.Y.S. at 1064.

<sup>52</sup> 180 Tenn. 137, 172 S.W.2d 812 (1943). See, Annot., 148 A.L.R. 375 (1944); cf., Annot., 87 A.L.R. 1308 (1933); Annot., 57 A.L.R. 535 (1928); Annot., 25 A.L.R. 1153 (1923).

also were signed in Tennessee. The sales agreement contained a provision that it should be a valid and binding agreement only when it was accepted by an executive officer of the vendor, and also a provision stating that it was the expressed intention of the parties that the agreement and all the terms thereof should be in conformity with the laws of any state wherein the agreement might be sought to be enforced. The machine was shipped from Ohio to Kansas and was later used by the purchaser in Missouri, Louisiana, Tennessee, and Arkansas. While in Arkansas, upon default of the buyer, it was repossessed by the defendant-vendor in a replevin action in Arkansas, without advertisement and sale as required by the law of Tennessee. Subsequently, the buyer instituted an action in Tennessee against the seller to recover the payments made upon the contract on the theory that the contract was a Tennessee contract and, thus, governed by Tennessee law; and stated that the seller had failed to comply with the provisions of the Tennessee conditional sales law as to advertisement and sale in the event of default.

The court, without deciding whether the contract was an Ohio or Arkansas contract, held that it was not a Tennessee agreement, and that, therefore, the Tennessee law did not apply. Said the court:

"The intention of the parties to this contract is controlling in the instant case. This must be found in the contract itself, as well as the situation of the parties and the particular necessity of the time and place and use of the subject matter of the contract. It was said by this court in *Bradford & Carson v. Furniture Co.*, 115 Tenn. 610, 616, 92 S.W. 1104, 1106, 9 L. R. A., N. S., 979 [1906], opinion by Mr. Justice Shields: 'All contracts should be construed and interpreted, when it is possible to do so, in accordance with the intention of the parties, so as to effect the ends contemplated and contracted for by them. . . .'

"The parties to a contract may contract with reference to the laws of any state or country, provided it is done in good faith, and provided the place selected has a real or substantial connection with the transaction or subject matter of the contract. . .

"The express adoption of the foreign law by the parties has the same effect as adoption by rule of law."<sup>53</sup>

It should be observed that the court made the intention of the parties the essence of control in this case; and, that the court limited that control over the contract to "good faith" exercised on the part of the parties in the selection of their referral law and that there

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<sup>53</sup> *Id.*, at 140, 172 S.W.2d at 814.

must be a "substantial connection of the law of the place selected with the transaction or its subject matter." The term, "good faith," as used here has much of the significance of the use of the word "non-fraud" found in *Igleheart Bros., Inc. v. John Deere Plow Co.*,<sup>54</sup> as previously observed. The matter of "substantial connection," has been previously discussed.

In *Wilson v. Lewiston Mill Co.*<sup>55</sup> (a presumed-intent statute-of-frauds case involving the sale by New York cotton brokers to a Maine company), the court stated:

"It is now contended that the contract was a New York contract, and not a Maine contract, and that, consequently, it is not controlled by the statute of frauds of Maine. Owing to the great number of cases appearing in the books bearing upon this question, its solution is involved in some difficulty. The transactions of the business world are so numerous, and of such a variety, that it is difficult, if not impossible, to formulate a general rule that should control in all cases in the determination of such a question. In some cases the place where the contract was accepted has been considered as controlling; in others, where the contract of affreightment was made; and still others, the place where the contract is to be performed. [citing cases]

. . . A further discussion of them we do not deem necessary or profitable, for, as has been stated, the question must be determined with reference to the facts and circumstances surrounding the parties in each case presented, and the intention of the parties, so far as it is disclosed, must control. The place where the contract is accepted is important. It fixes the time that the minds of the parties met, and the contract was consummated. It does not, however, necessarily determine that place or law under which the contract must be executed. So, also, is the place important where the contract was talked over, and its substantial details arranged. Yet this, standing alone, may not control, for the place in which the contract is to be executed is of equal importance in determining what must have been the intention and purpose of the parties. The *lex loci solutionis* and the *lex loci contractus* must both be taken into consideration, neither of itself being conclusive; but the two must be considered in connection with the whole contract, and the circumstances under which the parties acted in determining the question of their intent.<sup>56</sup>

The case has a "ring" of some significance. First, the statute of

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<sup>54</sup> 114 Ind. App. 182, 51 N.E.2d 498 (1943).

<sup>55</sup> 150 N.Y. 314, 44 N.E. 959 (1896).

<sup>56</sup> *Id.*, at 322, 44 N.E. at 961.

frauds (to be discussed in another article) is held to be substantive and not procedural so that the law controlling the substantive aspects of contracts will control its application also. Second, the court points out, in no uncertain words, that what it is interested in is the intent of the parties. Third, the court then indicates that "the place of performance," "the place of making," *et cetera*, are but way-stations on the road leading to that intention. They are but means taken into consideration by the court to determine, when there is not a clearly expressed intent of the parties, what was the actual intent of the parties. In other words, they are mere presumptions that stand for rebuttal when the evidence indicates what was the true intent of the parties.

The court, in *International Harvester Co. of America v. McAdam*,<sup>57</sup> observed that the case concerned an action to recover on a promissory note against a married woman, who signed as an accommodation maker with her husband and another. At the time of the execution of said note all of the makers were residents of South Dakota; this state also was the place of performance. When the suit was begun the wife and husband were residents of Wisconsin. The wife pleaded incompetence to bind herself as an accommodation maker because of coverture. Under the law of South Dakota, she had such competency; under the law of Wisconsin she was incompetent. So, the note was valid as to the wife in the place where it was made; would it be held valid in Wisconsin? What law would govern the contract?

The Wisconsin court observed that there are a few principles that govern such matters.

"The first principle is this: As to personal contracts the law thereof as to their validity and interpretation is that of the place where they were made, the *lex loci contractus*, unless the parties thereto intended that they should be governed by the law of the place of performance, the *lex loci solutionis*, or some other place. This is, the place of the contract is, generally speaking a matter of mutual intention, but the intended place, as determined by legal presumption in some cases and evidentiary circumstances in others, settles all questions as to the legal test of validity and interpretation. Such presumption, in the absence of evidence to the contrary, is that the place of making and performance, in a physical sense, is the place in a legal sense, but the place of performance when different from that of the actual making, is the place in such legal sense, subject to the presumption being

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<sup>57</sup> 142 Wis. 114, 124 N.W. 1042 (1910).

rebutted by clear evidence of intention, this being again subject to some exceptions in cases of intention to commit fraud on the law, such exceptions being possible but rare and not concerned in the case in hand [citing cases]. . . .

Another rule is this: The law of the place of performance regulates the matters in that regard, while matters respecting remedies depend upon the law of the forum. . . . A fourth rule is this: The law of one state having, *ex proprio vigore*, no validity in another state, the enforcement of a foreign contract which would not be void by the law of the forum where its enforcement is judicially attempted, depends upon comity which is extended for that purpose, unless the agreement is contrary to the public policy of the state of the forum, in that it is contrary to good morals, or the state or its citizens would be injured by the enforcement, or it perniciously violates positive written or unwritten prohibitory laws; the extent to which comity will be extended being very much a matter of judicial policy to be determined within reasonable limitations by each state for itself. . . . Every state, within certain limitations not necessary here to indicate, has a constitutional right to establish its own peculiar policy. That may be done by legislative enactment or by judicial conception and interpretation of the common law, and we may add here of what is injurious to the welfare of the state or its citizens [citing cases]. . . . A further rule is this: The doctrine that the law of the place of a contract governs as to its interpretation and validity, applies to the capacity of parties, including that of married women, to bind themselves in the matter attempted. . . . The last rule that needs to be stated is this: A contract under the foregoing is not, necessarily, contrary to the public policy of a state, merely because it could not validly have been made there, nor is it one to which comity will not be extended, merely because the making of such contracts in the place of the forum is prohibited, general statements to the contrary notwithstanding. . . . There must be something inherently bad about it, something shocking to one's sense of what is right as measured by moral standards, in the judgment of the courts, something pernicious and injurious to the public welfare. . . . The dividing line, it will be seen, is at the point where inherent harmfulness commences."<sup>58</sup>

The court then held the contract valid. This case in addition to setting forth what appears to be sound rules in the choice of law of conflict-of-laws contracts, also brings into focus once more an exception to the parties' choice of law, namely, here fraud upon the law. We may ask the question, What law of what place does the court mean? Conflict-of-laws agreements may, and often do,

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<sup>58</sup> *Id.*, at 118, 124 N.W. at 1044.

involve laws of several places. Which place and what law? Notice that the court says it is rare. But it is not rare for parties by the selection of their laws to govern a contract, or for that matter, for the courts in finding a presumed intent of the parties in order to render a decision in accord with what the courts believe to be parties' intent, to avoid some laws that have vital connections with an essential element of the transaction. Whether that element is essential or not and whether the connection is the most vital or not depends on who is making the adjudication. No two people see a set of facts alike; this is a truism too common to gainsay. Evidently, what the court here means by fraud upon the law is something in effect that is obnoxious, pernicious, harmful to the state or its citizens, detrimental to the public welfare; in other words, setting a pernicious example for a healthful state to have as a precedent. If this definition adequately defines what the courts mean by fraud upon the law, it is in essence reduced to a matter of public policy and it is not an additional exception to the autonomy theory but a part of the public policy we have mentioned as the main exception, if not the only one, to the autonomy of the parties. For freedom of contract means free will on both sides of the transaction; and if we have that, what is improper in parties selecting any reasonable law of reference that they may desire? As has been said before, rational parties making contracts in the business world are most unlikely to select irrational place-law for referral of their contract for its governance. Those who are highly irrational are, at times, provided for in a state asylum.

In *Miles v. Vermont Fruit Co.*<sup>59</sup> (warranty-presumed-intent case), and *Markay v. Brunson*<sup>60</sup> (warranty-presumed-intent case), Professor Stumberg believes that:

"Neither case involved a problem of interpretation in the sense of determining the mutual understanding of the parties. The seller and buyer had opposing ideas as to the meaning of the terms used and the question narrowed down to one of deciding whether effect should be given to the understanding of the seller or to that of the buyer, without anything in the negotiation pointing to the usage of a particular place as within their joint contemplation."<sup>61</sup>

Professor Stumberg believes the court here used the intent theory

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<sup>59</sup> 98 Vt. 1, 124 Atl. 559 (1924).

<sup>60</sup> *Markay v. Brunson*, 286 Fed. 893 (4th Cir. 1923).

<sup>61</sup> STUMBERG, *CONFLICT OF LAWS* 405-06 (2d ed. 1951).

to arrive at its conclusion, but the evidence shows conflicting intentions.<sup>62</sup> Is not this haphazard means of trying to arrive at a balanced decision what one may expect from not using the expressed intention of the parties?

Numerous other cases have indicated that courts are ready to except a reasonable choice of law by the parties to a contract and recognize spatial contacts as mechanical techniques for arriving at an "intent" not clearly expressed.<sup>63</sup>

The effects of the autonomy of the parties on the validity of conflict-of-laws sale-of-personal-property contracts in regard to the contract rights and obligations only, in contradistinction to title matters, may be summarized as follows: (1) the courts are determined to ascertain the intention of the parties and, in general, to see that the validity of the obligation is governed by the law that the parties intended to have govern it; (2) when the parties have not expressly stipulated a law to govern the validity of their contract, the courts may use surrounding circumstances of the transaction in order to ascertain what the parties intended as the law to govern their contract; (3) the use by the courts of "place of performance," "place of making," *et cetera*, will often indicate presumptions on the part of the courts that the parties by contracting within these spatial contacts of the contract intended that their agreement be governed by the law of one or more of them; (4) the limitations on the parties use of the autonomy theory are in essence tied to one main limitation, namely, public policy of the forum or of some law of a place having a vital or natural contact with an essential element of the contract as seen by the forum; and (5) constitutional limitations may be interjected on appropriate occasions to limit the forum's capricious use of policy determinants to negate parties' choice of law to govern the validity of their contract.

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<sup>62</sup> *Ibid.*

<sup>63</sup> E.g. *Ringling Bros.-Barnum & Bailey Shows, Inc. v. Olvera*, 119 F.2d 584 (9th Cir. 1941) (approving application of Florida law to tort liability limitation clause where parties expressed Florida law should govern, cause of action arose in Kansas, and suit was brought in California); *Croissant v. Empire State Realty Co.*, 29 App. D. C. 538 (1907); *Yousoupoff v. Widener*, 246 N. Y. 174, 158 N. E. 64 (1927) (applying contract law of England in a suit between an Englishman and a Pennsylvanian, because of considerable spatial contact with England and dealing with the law of England as that which the parties "intended" to apply in absence of specific expression of a contrary agreement); *Columbia Weighing Mach. Co. v. Rhem*, 164 S.C. 376, 162 S.E. 427 (1931) (giving effect to express stipulation that law of New York should apply); *D. Canale & Co. v. Pauly & Pauly Cheese Co.*, 155 Wis. 541, 145 N.W. 372 (1914) (citing *International Harvester Co. v. McAdam*, *supra*, note 57.)